



Supreme Court of the United States

October Term, 1977

No. 77-41

CITY OF CLEVELAND, OHIO,
Petitioner,

vs.

THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
EIGHTH APPELLATE JUDICIAL DISTRICT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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In accordance with Rule 40(3) of the United States Supreme Court Revised Rules, no repetition of the opinions below, jurisdictional basis, or statutes involved in the Petition is made in this Brief in Opposition. Respondent adopts Petitioner's statement of these items without approving the characterization made in Petitioner's listing.

QUESTION PRESENTED

Whether this Court will deprive the State Court of jurisdiction to resolve this utility contract dispute, involving determinations of state law, merely because the utility is also subject to federal regulation.

STATEMENT OF THE CASE

The Cleveland Electric Illuminating Company (hereinafter referred to as "CEI") is an investor-owned public utility serving the Greater Cleveland and Northeast Ohio Area. CEI's customers account for all but approximately 20 percent of the retail electric load in the City of Cleveland. To serve that remaining retail load, the City of Cleveland operates a municipal power utility. The Division of Light and Power of the City of Cleveland, Department of Public Utilities, is the operational manager of the utility, but all control of rates and expenditures is vested by charter in the Cleveland City Council. In the proceedings below, the City-owned utility is repeatedly identified by its major facility, the Municipal Electric Light Plant ("MELP").

This case involves the City's failure to maintain payments under a contract made with CEI to provide power to assist MELP with its retail load.

A severe power outage in the City's system during Christmas, 1969, caused the City to seek a tie-in to the CEI system. On January 19, 1970, the Cleveland City Council enacted an ordinance authorizing a contract with CEI for a tie-in. The City then entered into an agreement with CEI and that agreement was subsequently amended. Electrical service to the City was commenced in February, 1970, and has continued until now.

The agreement between the City and CEI, the rates set by agreement, and three subsequent amendments to the agreement were all filed with and approved by the Federal Power Commission (hereinafter designated "FPC"). No protest to the agreement or the rates charged thereunder were ever filed by the City with the FPC until after the City fell behind in its payments under the agreement and after CEI had filed suit to collect on the payments

past due in the Common Pleas Court of Cuyahoga County, Ohio.

The City's response to the CEI collection action in state court was to commence proceedings before the FPC. The FPC ordered CEI to maintain the interconnection permanently, confirmed the rates charged from February, 1970 to May, 1972, and established new rates commencing May 17, 1972. All other issues concerning the contract were also resolved against the City. The City appealed the FPC action to the United States Court of Appeals for the District of Columbia Circuit.

While the federal appeal was pending, CEI filed a second collection action in the same state court for monies due since May 17, 1972. The two collection actions were consolidated and submitted to the Common Pleas Court for trial without jury. The trial court on June 4, 1975, ruled in favor of CEI on the first collection action, and ordered judgment in the amount of \$547,115.33 plus interest for the City's breach of the agreement. On the second action, the trial court dismissed the complaint for want of jurisdiction.

On December 2, 1976, the Court of Appeals of Ohio, Eighth Appellate District, affirmed the lower state court's judgment for CEI in the first action, reversed the lower court's determination that it lacked jurisdiction to hear the complaint for collection in the second action, and remanded the second action for trial in the lower court. The City appealed to the Supreme Court of Ohio, which refused to review the decision of the Court of Appeals of Ohio, Eighth Appellate District, on April 8, 1977. Thereupon the City filed its petition for writ of certiorari with this Court.

ARGUMENT

The issue raised in this petition is a narrow one that has already been clearly decided by this Court. No degree of protracted rationales can transform it into one requiring reexamination by this Court. The courts below correctly determined that there is jurisdiction of utilities regulated by federal law in state courts for state law remedies.

I. The Ohio Court of Appeals Correctly Determined That the Existence of Federal Regulatory Authority Over Public Utilities Does Not Bar a Plaintiff Utility From Pursuing At Its Option Remedies Based Solely on State Law In State Forums.

This case is a collection action, plain and simple. One of two parties to a contract fell behind on payments under the contract. The other party sued for relief in the state courts of the state in which both parties reside, the same state in which the contract was made. The issues in the state tribunal were whether or not the agreement conflicted with the terms of the authorizing ordinance and whether or not funds were due to CEI because of the electrical energy delivered to MELP by CEI. The state tribunals resolved all of the questions on the basis of state law.

The fact that the party that fell behind in payments under the contract was the City of Cleveland is no bar to state court jurisdiction. The issues of municipal contract law remain state law questions. The municipal law question of whether or not the ordinance established the terms of the contract is a question of state law. The fact that the plaintiff in suit is the Cleveland Electric Illuminating Company, a public utility subject to federal regulation, does not change the nature of the state law questions put in suit. CEI might also have pursued its remedies under federal law. CEI has the right to pursue remedies under

state law in a state tribunal. "[T]he party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 25, 33 S. Ct. 410, 57 L. Ed. 717 (1913).

In *Cleveland Electric Illuminating Company v. Cleveland*, 50 Ohio App. 2d 275 (1976), the Court of Appeals of Ohio, Eighth Appellate District, correctly ruled:

Under the Ohio Constitution, Section 4, Article VI, and R.C. 2505.01, the Common Pleas Court has jurisdiction to adjudicate the rights and obligations of the parties under Ohio law without resort to the Federal Power Act or the rules, regulations, or orders thereunder. (Respondent's appendix, A-18.)

The petition fails to recite any challenge to the correctness of that ruling.

II. The "Exclusive Jurisdiction" Granted the Federal Courts By Section 317 of the Federal Power Act (16 U.S.C. §825p) Does Not Deprive The State Courts of the Power to Determine Questions Involving Regulated Utilities.

When CEI elected to bring suit in the state courts of Ohio on a contract claim, it did not seek to avoid the regulations and rules of the Federal Power Commission. CEI filed its collection action in the same state court system where it files all its collection actions. Like any other customer, MELP failed to pay its bills and CEI sued to collect.

The City of Cleveland, acting like many delinquent customers do, sought to delay the suit. Because of the federal regulatory scheme, the City's first response to the suit was to file a complaint before the FPC. The FPC resolved the issue against the City and the City appealed the FPC action. The Court of Common Pleas of Cuyahoga County resolved the issue against the City, and the City

appealed that court's decision. It has been over six years now and the City still has not paid all of its bills to CEI.

In its petition for writ of certiorari, the City argues that the state court judgment cannot stand because the Federal Power Act "would appear to give the federal courts exclusive jurisdiction over all collection actions based on the tariffs set by the Federal Power Commission" (Petition at page 4). To make such an argument, the City must ask this Court to "define the limits" of its ruling in *Pan American Petroleum Corporation v. Superior Court of Delaware*, 366 U.S. 656, 81 S. Ct. 1303, 6 L. Ed. 2d 584 (1961). Actually, the City is asking this Court to overrule its decision in *Pan American*, because the pronouncement in that case is incapable of redefinition without overruling.

The *Pan American* case involved a provision of the Natural Gas Act identical to Section 317 of the Federal Power Act. A natural gas pipeline company sued in state court to recover overpayments according to the terms of its contract with two natural gas producers. Claiming the state tribunal lacked jurisdiction because "exclusive jurisdiction" was given under the Natural Gas Act to the federal courts, the producers sought a writ of prohibition in the state court. The state supreme court denied the writ and the producers obtained a writ of certiorari to this Court to review the issue. In an opinion for a unanimous Court, Justice Frankfurter wrote:

"Exclusive jurisdiction" is given the federal courts but it is "exclusive" only for suits that may be brought in the federal courts. Exclusiveness is a consequence of jurisdiction, not a generator of jurisdiction because of which state courts are excluded. 366 U.S. at 664.

An examination of Section 22 of the Natural Gas Act (15 U.S.C. §717u) and Section 317 of the Federal Power Act (16 U.S.C. §825p) indicates that the grant of juris-

diction is identical in both acts. Only by directly overruling *Pan American* could this Court rule for the Petitioner. The City is really arguing that, because the FPC regulates CEI and the Federal Power Act gives "exclusive jurisdiction" to the federal courts of all suits in equity and in law under the Act, CEI must pursue its overdue bills from the City before the Federal Power Commission or in the federal courts. Such an argument would suggest that all collection actions by regulated utilities must be brought to the FPC and the federal courts. The Congress could not have intended such an outrageous grant of exclusive jurisdiction. The argument ignores the countless state law issues faced by a regulated utility, e.g. zoning, land appropriation, and negligence. Public policy could not be served by bringing all such actions before the federal court.

III. The Petition Raises No Substantial Question of Federal Law.

No amount of strained semantics can take this case outside the clear principle of federal law established in the *Pan American* case. The state courts have jurisdiction to hear causes of action based upon state law. The presence of a federal regulatory scheme for one or both parties in a state cause of action does not change the basic jurisdictional maxim enunciated by the Court in *Pan American*. Not only does the petitioner seek his writ of certiorari on an issue already clearly decided by the Court, but the issue the petition raises has been correctly decided by the state court. No substantial question of federal law is raised by the petition.

CONCLUSION

For all the aforementioned reasons, the respondent respectfully submits that this Petition for Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District, should be denied.

Respectfully submitted,

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